No. 14

In the United States Circuit Court

OF APPEALS

FOR THE

NINTH CIRCUIT.

MAURICE WISE, ET AL.
Defendants in Error,

vs.

CHAS. M. JEFFERIS,
Plaintiff in Error.

ASSIGNMENT OF ERRORS.

AND

BRIEF FOR PLAINTIFF IN ERROR.

TOOLE & WALLACE,
Counsel for Plaintiff in Error.

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FIRST.

Error of the Court in permitting defendants in error against the objection of the plaintiff in error, to omit and refuse to read a part of the answer of the witness Andrew Burleigh to interrogatory VII after having read the interrogatory and part of the answer thereto. (Printed Record pages 35, 36, 37, 38 inclusive.)

SECOND.

Error of the Court in allowing the defendants in

error against the objection of plaintiff in error to amend their replication at the close of their case in chief. (Printed Record, page 61.)

THIRD.

Error of the Court in overruling the motion of plaintiff in error for a verdict. (Printed Record, page 62.)

FOURTH.

Error of the Court in sustaining the objection of defendants in error to the introduction of the evidence offered by plaintiff in error showing the appointment of a receiver to take the goods in question in this action and the surrender and the delivery of said goods to such receiver by the plaintiff in error. (Printed Record, pages 50-56.)

FIFTH.

Error of the Court in charging the jury as follows:

But the defendant has returned upon the writ of attachment under which he claims to have taken this property, that he took it from the possession of Oliver, who was the agent of plaintiffs. This, I instruct you, would preclude him from maintaining

that Oliver was not in possession of the goods at the time he took them. (Printed Record, page 45.)

SIXTH.

Error of the Court in charging the jury, as follows:

In support of this claim they have introduced in evidence a bill of sale of the said property. This bill of sale, according to the evidence of the witnesses of the plaintiffs, Oliver and Turner, and the witness for the defendant, Landsman, who executed the same, was given as a security to William Oliver for the benefit of plaintiffs and as their agent. Being made as a security, it was only a chattel mortgage. It was not necessary that Oliver should, at the very instant of receiving the possession of this bill of sale, remove all the signs of Landsman from the building in which the property in dispute was situated. He was not required to do any other acts than was practicable, under the circumstances, to show that he had taken possession of the said property. He was entitled to a reasonable time in which to make all the changes necessary to show that Landsman had ceased to have any control over the property. There has been evidence in this case that William Oliver, as the agent of the plaintiff, procured a key to the store in which said goods were, whether from Landsman or not, seems to be disputed; that he discharged one

clerk who had been in the employ of Landsman and employed one of those who had been in his employ and another who had not been in his employ; that he excluded the defendant from any participation in the possession of said goods, and proceeded to sell and dispose of some of the said property, and that he stuck up some notices showing that he had charge of the store as agent. These facts, if true, would justify you in finding that there had been an actual change of possession of said property. (Printed Record, page 47.)

SEVENTH.

Error of the Court in charging the jury as follows:

There is no dispute but that Landsman or Landsman Co. owe the Chicago creditors $7741.81, but there is some dispute as to the amount Landsman owed Turner & Burleigh. Turner claims that the amount which increased this $7741.81 to $8500 was what he considered at the time would cover the amount that Landsman owed his firm, which would be $758.31. This amount was all that can be said to have been secured by this mortgage. But Landsman says that he did not owe them any such amounts, that he owed them some small amounts, and was to pay them $250 in the case he was prosecuting against Thompson for damages if a judgment was obtained against Thompson to the

amount of $5000. As to how much Landsman owed Turner & Burleigh is a question for you to determine from the evidence. (Printed Record, page 49.)

EIGHTH.

Error of the Court in charging the jury, as follows: That this sale of Landsman to Oliver for plaintiffs was void as to creditors, there has been a considerable evidence introduced upon this point which I am fearful may confuse you. The defendant had the right to present this issue upon the proof that he was acting for creditors of said Landsman in taking possession of said property, and was authorized to seize said property by a writ of attachment duly issued from a Court having jurisdiction of a pending case by an officer authorized to issue the same. But in the case in which the writ of attachment under which defendant seeks to justify, the clerk who issued the writ failed to require of the creditor, which defendant represents, the filing of such an undertaking, as was required by the statute in such cases, and such creditor did not file such undertaking. The defendant could not justify his taking of the property from plaintiffs under this writ.

He has failed, therefore, to establish an important point in his defense, namely, that the attachment proceeding under which he acted were such as is required by law. And, having failed in this point,

his defense that the mortgage to Oliver for plaintiffs was fraudulent as to the creditors for whom he acted, fails, and you must not consider any of the evidence upon the point as to whether this mortgage to Oliver for plaintiffs was in fraud of creditors or not. You may feel that, considering the evidence that has been admitted in the case and the argument of counsel, you ought to consider this question, and if proper evidence had been submitted, the Court would have willingly called upon you to determine this question as to whether this mortgage was fraudulent as to creditors; but as the Court has viewed the law, he has felt compelled to withdraw this question from you [Printed Record, pages 41-42]

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BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Prior to March 18th, 1889, Jacob E. Landsman, as the successor of J. E. Landsman & Co., and the surviving member of the firm, was conducting a business on Main street, in the city of Helena, known as the Northwestern Clothing House. He was at the time indebted to the First National Bank of Helena in a sum upwards of $8,000, and also to plaintiffs (save and except the firm of Turner & Burleigh)—the other plaintiffs being Chicago creditors—in the sum of about $7,400. One William

Oliver, as agent for all of the plaintiffs, except Turner & Burleigh, the latter being his attorneys, on the morning of March 18th, 1889, procured from said Landsman a bill of sale of all of his merchandise, trade fixtures, and all of the firm assets of J. E. Landsman & Co., and assumed to take possession of the stock thereunder. The power of sale expressed a consideration upon its face of $12,500, and Oliver claimed this as the amount of the indebtedness owing to the Chicago creditors. In the afternoon of the same day the defendant Jefferis, who was the Sheriff of Lewis and Clarke county, received a writ of attachment, regular upon its face, issued in a suit brought in a Court of general jurisdiction, to wit: the District Court of the First Judicial District of the State of Montana, in and for Lewis and Clarke county, wherein the First National Bank of Helena was plaintiff, and J. E. Landsman & Co. were defendants (which suit was brought to recover the said bank indebtedness, and in which, before the issuance of the writ in question, a sufficient complaint had been filed, summons sufficient in form duly issued and served), seized and levied upon and took all of the goods of Landsman & Co. [In the attachment suit the defendant, J. E. Landsman & Co., allowed judgment to go against them without objection for the full amount of the debt claimed, which judgment was rendered in April, 1889.] And after so taking the same, demand was made by Oliver, agent, on behalf of plaintiffs, for their possession. And a little over a year and a half there-

after, in 1890, the present suit was brought to recover the same of the Sheriff.

The defendant Jefferis in his pleadings justified the taking of the goods under the writ in question, and offered to prove that the sale to Oliver was in fact no sale at all, but a mere transfer of security. That, if a sale, it was fraudulent both in law and in fact. In law, because there was no sufficient delivery and change of possession, as against the representative of a creditor; and in fact, because the same was used for fraudulent purposes to ward off other creditors. At trial plaintiffs offered as part of their case in chief depositions of various parties, omitting therefrom, in reading same, direct interrogatories and the answers thereto, on the alleged ground that they consisted of rebuttal matter; and, in one instance, reading a direct interrogatory, and refusing to read on the same ground, more than a portion of the answer thereto, in which position they were sustained by the Court.

At the close of plaintiff's case in chief, (they having shown that defendant assumed to take the goods as an officer of a State Court, and it not appearing but that the goods were still in his possession, as such officer, and the pleadings, as they then stood, admitting the regular issuance of the bank's writ, and merely joining issue as to whether the defendant took the goods under it,) plaintiff's theory theretofore being, that if the goods were sold to Oliver the writ must run against Oliver, before defendant could take under it—defendant moved for a

non-suit [printed record, pages 21–22]. And, the same being overruled, defendant obtained leave to file it as a motion to direct a verdict [printed record, page 22]. Whereupon plaintiffs sought leave to amend their replication and were permitted to do so [printed record, 23–24–25, inclusive] against the written objection and exception of the defendant [printed record, pages 60–61]. This amendment conceeded the taking by defendant as Sheriff under the bank's writ, but sought to obviate the jurisdictional objection by alleging that judgment had been rendered and the property disposed of long before the commencement of this suit.

No further proofs were introduced, however, and the Court forthwith treated defendant's motion for a nonsuit as a motion for a verdict (Printed Record page 61-62) and overruled the same.

Defendant in its case offered and read, without objection, the record in the Bank attachment suit and the writ under which he acted (Printed Record page 38-39-40) on the back of which writ defendant in his return as Sheriff had stated that he took the goods from the possession of William Oliver, and the Court held the defendant concluded on the question of possession by his return upon the writ. The defendant also offered an order and all preliminary paper necessary to sustain the same (issued from the same Court as the attachment writs, made April 18, 1889 at the instance and in the suit of another creditor), appointing one Marcus Lissener receiver of this particular stock of goods,

and requiring the defendant to turn the same over to said receiver on presentation of a certified copy of said order, and defendant further offered to prove that such certified copy was presented on April 19, 1889 and that in accordance with the mandate of said order the goods were by the defendant delivered to said receiver and that defendant never had them afterward, which evidence was all excluded by the Court.

At the conclusion of the trial the Court instructed the jury that the defendant, though a Sheriff, and assuming to act as such, could not justify the taking of the goods in question from the possession of the plaintiffs under the writ of attachment above named, because of the fact that the undertaking filed in the action before the issuance of the writ of attachment was in its form of obligation not in compliance with the statue, and therefore that the writ was void and would not be a justification to officer as against a third person in possession, thereby taking away from the jury all the questions of fact in the case, determining the matter adversely to the defendant, and leaving the sole question with the jury to determine the amount which the plaintiffs should recover, which the jury found to be the amount of the actual debt as claimed by the defendant, and not the fictitious amounts claimed by the plaintiffs in their pleadings.

ASSIGNMENT OF ERRORS.

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chattel mortgage. It was not necessary that Oliver should, at the very instant of receiving the possession of this bill of sale, remove all the signs of Landsman from the building in which the property in dispute was situated. He was not required to do any other acts than was practicable, under the circumstances, to show that he had taken possession of the said property. He was entitled to a reasonable time in which to make all the changes necessary to show that Landsman had ceased to have any control over the property. There has been evidence in this case that William Oliver, as the agent of the plaintiff, procured a key to the store in which said goods were, whether from Landsman or not, seems to be disputed; that he discharged one clerk who had been in the employ of Landsman and employed one of those who had been in his employ and another who had not been in his employ; that he excluded the defendant from any participation in the possession of said goods, and proceeded to sell and dispose of some of the said property, and that he stuck up some notices showing that he had charge of the store as agent. These facts, if true, would justify you in finding that there had been an actual change of possession of said property. (Printed Record, page 47.)

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tion of a pending case by an officer authorized to issue the same. But in the case in which the writ of attachment under which defendant seeks to justify, the clerk who issued the writ failed to require of the creditor, which defendant represents, the filing of such an undertaking, as was required by the statute in such cases, and such creditor did not file such undertaking. The defendant could not justify his taking of the property from plaintiffs under this writ.

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SYNOPSIS OF ARGUMENT.

Reserving for after discussion the minor exception presented in the record, we first consider the action of the Court below, as last above stated, in taking the case from the jury.

EIGHTH ASSIGNMENT OF ERROR.

The statue in force at the time of the issuance of this writ (Section 182, p. 104, Mont. Compl. St., 1887), prescribed the form of undertaking thus: for the payment of "all damages he" (the defendant) "may sustain by reason of the issuing out of the attachment." (It may be stated in passing, in the section of the original bill from which Section 182 was compiled, as passed and approved February 23rd, 1881, the word "suing" not "issuing" appears, and therefore the use of the latter word was an error of the compiler, perpetuated from the erroneous print of the session laws of 1881.)

This act of 1881 was an amendment of Section 180, page 72, Revised Statutes of 1879, in which last section the language was: "All damages he may sustain by reason of the wrongful suing out," etc. And the undertaking required by the clerk before the issuance of this writ was upon a printed form and followed the language of the Act of 1879, (record p. ——.) The defect in this undertaking then, on account whereof the Court held the writ void and refused to allow the officer to justify under

it, lay in the use of the words "wrongful suing," instead of "issuing" or "suing" whichever the amendment might be held to be. The view of the Court being that, although the writ was fair upon its face, the rule whereby such a writ is a sufficient protection to the officer executing it, had no application when the officer was sued by a stranger; but that as against such stranger he must show that it was supported by a perfect bond.

This conclusion, while it may find support in some decided cases, is not in consonance with reason, works a manifest hardship, when applied in connection with other recognized rules of law; is unjustifiable on principle, and is expressly repudiated by the Supreme Court of the United States, the Court of last resort in this jurisdiction.

The premises on which a conclusion is reached are:

First—The writ is necessary to connect the officer with the creditor and can give him the latter's rights and defences.

Second—A perfect bond is a jurisdictional matter and its absence renders the writ absolutely void.

Third—A writ fair on its face, but void for extraneous causes, is unavailing for any purpose, and will not even serve as a protection to the officer of the Court from which it issued.

The first premise is a sound one, the two latter absolutely untenable and utterly false. The former is logical because a naked tresspaser could not

justify by showing ownership in some third person, *i. e.*, a second trespasser could not deprive a first of possession, but the latter would prevail by virtue of mere possession alone as against anyone not showing a better right, either in himself or in his principal, if acting in a representative capacity. For the reason then that the defense of fraud as against a debtor's vendee in possession is available to none save a creditor or his representative officer acting under his writ; and for the sole purpose of relieving himself of the attitude of a trespasser and putting himself in a position where he may be entitled to question the alleged title of plaintiffs to the goods, and to show that as to him they are the goods of the defendant in the writ, he must show that his principal, the creditor in the writ, is actually a creditor of the defendant. In other words, he must prove as an independent fact the debt from which the relationship of creditor and debtor springs. Having done this he next establishes relationship to the creditor by the writ, fair on its face, procured in the suit of the creditor and directed and delivered to him from a Court of general jurisdiction whose officer he is. Such writ connects him with the creditor not only as between himself and the latter, but also as between himself and the debtor; and entitles him to pursue the latter's property in whomsoever's hands he may find it as freely as could the creditor himself, with this additional privilege accruing to him which his principal, the creditor, does not share in; namely,

of claiming protection for acts done under the writ, though the latter be voidable or even void, provided the latter be on its face apparently valid. The principal, however, in those States where the preliminaries are jurisdictional, is held answerable because he himself has conducted the proceedings which rendered the writ void.

Keer vs. *Mount*, 28, N. Y., 659.

The officer is exhonerated because he is in no sense responsible for the preliminary steps; the writ is to him the mandate of his Court, which, as its officer he is bound to obey. For had an officer, receiving such a writ, refused to levy on property of the debtor, confessedly he would thereby render himself liable to the creditor plaintiff.

47 Am. D., 148.
20 Vt., 479, S. C. 50 Am. D., 52.

And our own Statute (sec. 855, p. 873) would seem to declare the rule above announced. Certain it is that if he be held bound to serve such a writ he should be permitted to claim its protection. Or, if not protected by it, he should be entitled to refuse to serve. There can be no justice in requiring him to commit what the law will construe as a trespass. True, there are cases holding that before infringing on the possession of a stranger he may require an indemnity bond, only as against the title in the goods seized, however, and not as against the laten defects in the writ.

But these very cases concede that when the bond is furnished him he is no longer justified in refusing to levy. But as this is a mere official privilege, it has been contended that nothing short of a writ of replevin, naming specific articles, will warrant an officer in taking goods from a stranger to the writ. Hence, that in so taking them under a writ of attachment, the officer departs from his writ, becomes a mere trespasser, and his act, not being within the mandate of the writ is not official, and does not entitle him to claim official immunity for it. The Supreme Court of the United States has set this contention at rest, however, having expressly declared that the act of an officer in taking from the possession of a stranger goods of the defendant in an attachment writ is as much an official act as if he took them from the possession of the defendant himself, and that no distinction whatever exists between the two classes of cases.

Lammon vs. *Feusier*, 111 U. S., p. 17, 21.
See also, *Casenach* vs. *Conno*, 5 Binney, 184.
Greenfield vs. *Wilson*, 13 Gray, 384.
State vs. *Jennings*, 4 Ohio St., 418.
12 Neb., 580.
27 Tex., 23.
3 Bush., 62.
64 Mo., 185.
11 Iowa, 329.
4 N. Y., 179.

It is the universal rule that, as against the defendant in the writ, if fair on its face, its mere production justifies the officer.

What then is the interest of the stranger in possession, that should entitle him to demand more than the defendant? He is concerned in two matters only:

a. In knowing that the person litigating with him is one having a right to assail his title, *i. e.*, a creditor or one acting by his authority.

b. In determining whether the goods are his or the debtors.

The proof of the debt and the production of the writ in a suit on the debt establishes the former, while the fraud or fairness of the sale would determine the latter. If he be the actual owner, then he recovers as against the writ, whether void or valid. If not the owner, he gets an advantage that the real owner, the debtor, would not be permitted to have, secures a title by a technicality, and defrauds a creditor of the real owner.

Moreover, the undertaking provided for in Section 182, *supra,* is conditioned solely for the indemnity of the defendant in the attachment suit, and he would be the only one injured in the event the clerk had entirely neglected his duty and issued the writ without requiring any undertaking whatever. And so the privilege of objecting to either the lack of or defective character of the undertaking is purely personal to the defendant, and to him alone, a credi-

tor or other third person not having this privilege, even when appealing in the original suit for that purpose.

Drake on Attach., Section 143.
Van Orsdale vs. *Krun*, 9 Mo., 397.
Wigfall vs. *Byne*, 1 Rich. L. (S. C.), 412.

If then plaintiff could not have maintained such an objection in the original suit itself, on what theory shall they be permitted to do so in a collateral action,and thereby deprive an officer of the protection of a writ fair on its face, and to which he owed obedience? Why then should this stranger's right be greater than the defendants in the writ, for whose indemnity only the bond is furnished, and what privilege is there then personal to them so that they ought to be permitted to question its sufficiency at all, much less by a collateral attack?

Thus far, we have been considering the matter as if the undertaking were a jurisdictional matter and the writ actually void, because of its departure in the use of the word "wrongful" from the statutory condition. No such consequences result from this undertaking, however. A construction of this statute, as to the effect of such an undertaking, by the Supreme Court of Montana, though given before statehood, if in harmony with expressed views of the Supreme Court of the United States, would be followed here. Our Court had occasion to pass upon such an undertaking—word for word, the same—on appeal from an order dissolving an attachment bond

on it. They held the undertaking to be merely defective: upheld the levy; set aside the order dissolving, and declared that the plaintiff should have been permitted to cure the defect by filing a new undertaking. Hence they determined that the undertaking was not jurisdictional; and that the writ was not avoided by the defect.

Miles vs. *Pierce*, 5 Mont., 549.

That was a case, too, wherein the defendant in the writ, made a direct motion before answer and in the original suit, to set aside the levy, a proceeding directly by the party concerned, to avail himself of whatever privilege he had. And yet the Supreme Court regarded it as a mere defect, the subject of amendment, and so not even making the writ voidable at the defendant's option.

Again, the undertaking and the affidavit bear very different relations to the writ under our statute, the provisions of which in this respect are peculiar. For, while it is provided that "no writ of attachment shall be issued until the plaintiff, his agent, or attorney shall file with the clerk an affidavit," etc., (Sec. 180, p. 109, Compl. St.), the same limitation is not enforced as to the undertaking, but, as to the latter, it is simply provided that "before issuing the writ the clerk shall require a written undertaking," etc., (Sec. 182, *supra*.) So that while the filing of the affidavit is made a prerequisite to the issuance of the writ, such is not the case with the undertaking. But it simply imposes a

duty on the clerk to require it. And so adverse decisions based on defects in affidavits could be distinguished from the case of a defective bond. Nor is it required that either the affidavit or bond be attached to the writ. They are simply filed with the clerk, and the officer is supposed to know nothing whatever of them.

Our statute provided the time within which such defects must be taken advantage of by motion to dissolve, and expressly limits the right to object to the period prior to answering (Sec. 200, p. 109, Compl. St.). And even in the absence of such a statute, the Courts have uniformly declared that a defective bond must be taken advantage of before plea or answer, or else is deemed waived.

Drake on Attach., Sec. 144.
40 Mich., 543.
21 Mo., 296.
5 Ala., 213.
19 Greene., 366.
4 Ill., 21.
85 Ill., 138.

In the case at bar. the defendant in the writ not only did not take advantage of the insufficient undertaking, but expressly waived it by permitting judgment, as well as by seeking and consenting to the appointment of a receiver of the goods (as developed in the proofs offered in Bill of Exceptions, No. ——, which were rejected by the Court.)

Del Col vs. *Arnold*, 3 Dallas, 333.

And under the rule laid down in *Pierce* vs. *Miles, supra.*, even had he moved to vacate the attachment before the expiration of time for answering, the Court would have afforded the plaintiff an opportunity to amend the undertaking and correct the defect.

We insist then that reason, as well as adjudicated cases, repudiate the doctrine declared by the Court below, and deny that an officer can ever be deprived of the protection afforded by process good upon its face on account of defects in preliminary proceedings or failure of the clerk to perform his duty, whether action be brought by the defendant, in the writ against the officer, or by a stranger.

14 Wis., 93.
23 Wis., 365.
44 American D., 76.
Cody vs. *Ware*, 6 Iredell Law, 991.
34 American D., 509.

And whatever may be the contradiction in decided cases upon the foregoing proposition in the State Courts, the rule as last above announced has been settled, and forever put at rest by a line of decisions of the Supreme Court of the United States, in which, uniformly, the doctrine erroneously adopted by the Court below, has been repudiated, and the more logical rule, which we insist upon, has been unequivocally declared to be the rule of guidance in this jurisdiction.

109 U. S., 217.

10 Wallace, 300.
14 Wallace, 613.
14 Howard, U. S., 586 opinion page 588.
10 Peters, 449.
2 Howard, U. S., 319.

While Mr. Drake, in his work on attachments, expresses a contrary opinion, he relies upon cases from the Supreme Court of New York, the Hand cases in 7th California, and case of *Matthews* vs. *Dinsmore*, 43 Michigan. The latter case is the identical case which is reversed in 109 U. S. The New York Supreme Court cases declare a rule which seem to have been reconsidered in the Court of Appeals. See

2 Comstock, 477.

And Nebraska has followed Mr. Drake and the cases above referred to. And so all adverse decisions upon this question will be found to sustain themselves by the very cases cited in brief of counsel for respondent.

Matthews vs. *Dinsmore*, 109 U. S., *supra.*

For reference to Drake and cases relied on by him, see

21 Neb., 491.

FIRST ASSIGNMENT OF ERROR.

The error assigned under this heading involves

an interesting matter of practice, but we content ourselves with the simple statement, and will not take time to elaborate in argument thereon.

SECOND ASSIGNMENT OF ERROR.

The action of the Court in allowing at the close of plaintiff's case in chief, the amendment to their replication worked a vital injustice to the defendant. Section 1549, page 1071, Montana Compiled Statutes, provides as follows:

"The provisions of the foregoing section of this chapter shall extend to all such bills of sale deeds of trust and other conveyances of goods, chattels or personal property as shall have an effect of a mortgage or lien upon such property." This occurs and is a part of our chattel mortgage Act. It being proven that this bill of sale was given as a mere security for the debt, all the provisions of the chattel mortgage Act were applicable to this transaction, (and indeed the Court below in its instructions refers to this bill of sale as security in the nature of a chattel mortgage). Section 1546 of the same Act in providing thus, "personal property mortgaged may be taken on attachment or execution issued at the suit of a creditor of the mortgagor, but, before the property is so taken the officer must pay or tender to the mortgagee the amount of the mortgage debt with interest or must deposit the amount thereof with the County Treasurer of the County

in which the mortgage is filed, payable to the order of the mortgagee," recognizes the right to levy, and makes the act of levy upon goods so mortgaged a lawful one, imposing a duty upon the officer in connection therewith, but not making the performance of this duty a condition precedent to the validity of the levy. The wisdom of which is apparent at a glance. For it would be a manifest hardship—the plaintiff in an attachment suit having furnished the officer with moneys to make the tender or pay the debt—to permit the latter, by violating the requirement of the act, in failing to pay the same, thereby to defeat the creditor's writ and levy. For this reason, it was deemed wiser to give the mortgagee a remedy upon the officer's official bond, and this policy would enable the creditor without hazard to test, at a later time, the sufficiency of the mortgage. If in doing this lawful act the officer fails to pay, or tender or deposit the debt, a statutory obligation of payment arises in him, which could only exist on the theory that the taking was authorized by law.

Wood vs. *Franks*, 56 Cal. 218.

All the foregoing provisions and principles (controlling the case, had the defendant been sued originally as an officer for a levy in violation of Section 1546, *supra*) could have no application or bearing to the suit originally begun against the defendant as an individual, for the gist of the latter cause of action as it stood at the close of plaintiff's

case in chief, when the amendment to the reply was made, was for the wrongful taking by the defendant as an individual; while by the allowance of the amendment an entirely new cause of action, *i. e.*, one against the defendant as an officer under Section 1546, *supra*, was presented which made the taking lawful and in which the only wrong would be in the refusal by the officer to pay or tender or deposit the amount of the debt. And on the latter point plaintiff's pleadings, even after the amendment to the reply, were utterly defective in that they do not aver, nor did the proofs develope any refusal or failure to pay or tender or deposit. And for aught that was alleged or proven by plaintiffs the true amount of their debt might then and may be now on deposit in the County Treasurer's office. Had that issue been submitted by the pleadings, or had such an action been originally brought it would have enabled the defendant Sheriff to have tendered an issue upon the misconduct of the plaintiff in concealing the truth as to their indebtedness and demand.

It is aptly said that one true test, upon the question of a change in cause of action, is whether the original and the amended pleadings would be sustained by the same evidence.

Boone on Code Pleading, Sec. 227.

Tested by this rule we see at once that this evidence as to payment or tender or deposit would be vital and material only to the action as amended

and utterly inapplicable to the original cause, and therefore that the amendment required an entirely different measure of proof.

And further because the amendment itself developed an utter lack of that wrongful taking which was the gist of the action originally. Again amendments are never allowed where the effect would be to deprive the party of valuable defences to the new cause of action.

Boone on Code Pleading, Sec. 242.
84 North Carolina, page 496.

If this action had been begun on the day the amendment was allowed, as an independent suit for levying upon mortgaged goods without "paying" or "tendering" or "depositing," our Statute of Limitations, Section 42, page 69, which provides "2. An action upon a liability created by the statute other than a penalty.

3. An action for taking, detaining or injuring any goods or chattels, including action for the specific recovery of personal property, should be commenced within two years," would have been available as a complete defense to the defendant, whether such an action would be regarded as one to enforce a statutory liability, or one founded upon the taking of goods, for the act or wrong must have occurred prior to March 19, 1889, and the amendment was not made until June, 1891.

Moreover, it is held as to a similar liability so

created by statute, that it is in the nature of a penalty or forfeiture, in which event, Section 45, page 69, of our statutes, which provides: "Action for a penalty, or forfeiture, when an action is given to the individual, except when the statute imposing it prescribes a different limitation, shall be commenced within one year," would have barred this action on March 19, 1890, long before the time of the filing of the original complaint in this suit.

Bank vs. *Bliss*, 35 New York, page 412.

By permitting this amendment at the time it was allowed, to the replication the defendant was deprived of the foregoing defense, and this point was expressly presented in the objections to the allowance of the amendment. (See Printed Record, page 61.)

THIRD ASSIGNMENT OF ERROR.

As the case stood under the proofs before the amendment, the Court was without jurisdiction. This amendment being made to the replication was deemed denied, and so not being supplemented by further proofs the motion for a verdict should have been granted under the doctrine announced in

24 Howard, 450.
24 Howard, 583.
Covelle vs. *Heyman*, 111 U. S. 177-184.

The further ground urged (see Printed Record, page 62) that the " Sheriff's levy would be rightful even if the bill of sale was valid, and Sheriff would only be liable for amount of payment which he ought first to have made, involves the same proposition urged under " b," and has been fully considered above. It is clear that there being neither averment nor proof that the debt was not tendered or deposited the motion should have been granted, even had there been no variance in the cause of action.

FOURTH ASSIGNMENT OF ERROR.

This involves the right of the Sheriff to justify by showing that by other process issued by a Court having jurisdiction over the property, the Sheriff was compelled to, by *vis major*, and did surrender the goods to a receiver. We submit that this act of the Court below excluding this proof was erroneous for these reasons.

1.

Such a surrender would constitute a justification of the Sheriff, because he was bound to obey the order directing the surrender of these goods to the receiver.

26 Cal., 108.
2 American State Report, 400.
100 American Dec., 744, note.

17 Wall., 87–96.
147 Mass., 385.

2.

Because the testimony was admissable to show recognition of the levy by Landsman and the existence of the debt, though this latter was established elsewhere by the production of the judgment against Landsman.

FIFTH ASSIGNMENT OF ERROR.

This presents the question whether the statement of the Sheriff, in his return, that he took the property from the possession of Oliver, is conclusive, so as to forbid him for assailing the nature of that possession in the right of the creditor.

And even if it were, we submit that there is a marked distinction between bare possession and the possession defined and required by our Statute of Frauds; for as against a creditor and the Sheriff, in his writ, the delivery must have been immediate, and the possession must have been actual, continuous and notorious, and open to all observers.

SIXTH ASSIGNMENT OF ERROR.

This involves the action of the Court upon a collateral instruction to the preceding one; if the pre-

ceding instruction could be justified, then this error assigned would be immaterial. But if otherwise, we submit that the Court in its instruction disregarded the rule as to equivocal possession.

SEVENTH ASSIGNMENT OF ERROR.

This instruction treats the question considered, as developed by uncontradicted testimony, and utterly ignores the evidence of Landsman as to the existence of any debt whatever, to Turner & Burleigh. That the Court could not rightfully treat this testimony of Landsman as not existing, see:

U. S. vs. *Reading R. R. Co.*, 123 U. S., p. 114.

While Landsman himself, might not be heard to contradict the terms of the writing which he had signed, he stood here as a mere witness for the defendant, and the creditors who were not at all bound thereby. It might be said that the bill of sale would estop Landsman in a suit, to which he was a party, from denying a debt. but he was a mere witness in this suit, and the creditor was entitled to know the actual facts.

The foregoing presents the various errors that we desire to insist upon.

And we respectfully submit, that for the reasons above set forth, and particularly because the Court erroneously took the case from the jury, because of

the alleged defective undertaking, that manifest error was committed upon the trial, that the case should be reversed and sent back for trial, to the end that the defendant may be permitted to establish his rights under the rule established by the Supreme Court of the United States.

Respectfully submitted,

TOOLE & WALLACE,

Of Counsel for Plaintiffs in Error.